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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
09/659,866	09/12/2000	Scott J. Jones	GOLDENH.001C1	2541
62912	7590	12/29/2011	EXAMINER	
MANUEL F. DE LA CERRA 6885 CATAMARAN DRIVE CARLSBAD, CA 92011			PASS, NATALIE	
			ART UNIT	PAPER NUMBER
			3686	
			NOTIFICATION DATE	DELIVERY MODE
			12/29/2011	ELECTRONIC

Please find below and/or attached an Office communication concerning this application or proceeding.

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UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE BOARD OF PATENT APPEALS
AND INTERFERENCES

Ex parte SCOTT J. JONES and KEVIN C. HUTTON

Appeal 2010-007647
Application 09/659,866
Technology Center 3600

Before, JOSEPH A. FISCHETTI, BIBHU R. MOHANTY, and MICHAEL
W. KIM, *Administrative Patent Judges*.

FISCHETTI, *Administrative Patent Judge*.

DECISION ON APPEAL

STATEMENT OF THE CASE

Appellants seek our review under 35 U.S.C. § 134 of the Examiner's final rejection of claims 2, 9, 10 and 15. Claims 1, 3-8, 11-14 and 16-29 are cancelled¹. We have jurisdiction under 35 U.S.C. § 6(b) (2002).

A hearing was held on September 8, 2011 in which arguments were heard.

SUMMARY OF DECISION

We AFFIRM.

THE INVENTION

Appellants claim a system and method for a medical transportation database (Specification 1:11-13).

Claim 2, reproduced below, is representative of the subject matter on appeal.

2. A computerized system for managing airborne transportation of a patient, comprising:
a first module comprising instructions for dispatching an aircraft carrying an airborne emergency transport crew to a patient site;
a second module comprising instructions for generating a calculated flight path to the patient site; and
a third module comprising instructions for tracking the actual flight path of the aircraft and determining whether the actual flight path varies from the calculated flight path.

¹ Appellants assert that claims 2-19 are pending and appealed (Appeal Br. 4; Reply Br. 10). However, the Examiner cancelled claims 3-8, 11-14, and 16-19 (Answer 2; Office Action mailed January 13, 2010 entitled "Cancellation of Non-Appealed Claims").

THE REJECTION

The Examiner relies upon the following as evidence of unpatentability:

Nathanson	US 5,122,959	Jun 16, 1992
Yee	US 6,044,323	Mar. 28, 2000

Schriewer, Scott. "Airborne ambulance Saves Precious," Tulsa World, Tulsa, Okla., May 22, 1996.

Aeromed Software, *available at* <http://www.aeromed-software.com>, 2/5/1998.

The following rejections are before us for review.

The Examiner rejected claims 2 and 9 under 35 U.S.C. § 102(a) as being anticipated by Aeromed.

The Examiner rejected claims 2, 9, 10 and 15 under 35 U.S.C. § 103(a) over Nathanson in view of Schriewer.

ISSUES

The issue of obviousness turns on whether Nathanson discloses that the Distance Out of Way is a determination of variance between the present position and the new stop such that Nathanson meets the claim requirement of *determining whether the actual flight path varies from the calculated flight path*.

The issue of anticipation turns on whether "instructions", associated with a module in a computerized system, are instructions for human intervention.

FINDINGS OF FACT

We find the following facts by a preponderance of the evidence:

1. The evidence presented in the Declaration dated December 20, 2004, (hereinafter referred to as Declaration), is sufficient only to establish conception of the claimed subject matter. The date of conception is prior to February 5, 1998. (Decl. ¶ 4a-i).
2. The Declaration only discusses the claimed system and method in terms of future capability, e.g., “[a] variety of functions *can be* performed by the individual computers in addition to the clinical medical record these include... Computer *can be* programmed... (emphasis added).” (Decl. Ex. D)
3. The Declaration and Exhibits fail to assert any facts of due diligence from the alleged time of conception date.
4. The Declaration states: “After conception of the invention as discussed above, the invention was either actually reduced to practice or was undergoing due diligence to reduce to practice prior to February 5, 1998. A beta test version of the service was presented at the Air Medical Transport Conference in Cincinnati, which occurred prior to February 5, 1998.” (Decl. ¶ 4j)
5. Appellants submitted a Supplemental Declaration on April 16, 2006 alleged to include evidence of actual reduction to practice (Appeal Br. 10), but this document was not entered below by the Examiner as not timely filed before the filing of an appeal brief. See 37 CFR 41.33(d)(2). (Advisory 6/21/06).
6. Nathanson discloses:

a. Distance Out of the Way: The total additional distance travelled if the new stop is to be inserted, or if the new stop is be reached directly from the vehicle's current location. A user defined scaling factor is applied to the straight line distance. Points are assigned for each mile and minute of additional travel.

Col. 16 ll. 51-56.

7. Nathanson further discloses the best candidate is determined based on criteria, one of which is the Distance Out of Way calculation (FF 6). Col. 16, ll. 46-50.

8. Nathanson further discloses:

The on-board vehicle hardware may include an automated vehicle locator system based -on the LORAN "C" coordinate navigation system. The LORAN transceiver signals the approximate real time vehicle position to the dispatch work station via a digital radio, automatically updating the actual position of the vehicles on the graphic display monitor. The vehicle information is displayed in the form of coordinate maps of the service areas. The maps display icon-based indicators of vehicle locations and downstream itineraries, pick-up and delivery locations, service zones and highlighted displays of vehicle routes.

Col.4, ll. 1-12.

ANALYSIS

We affirm the rejection made under 35 U.S.C. § 103(a), and reverse as to the rejection made under 35 U.S.C. § 102.

35 U.S.C. § 102 Rejection

Concerning the anticipation rejection of claims 2 and 9, Appellants argue that, "the Declaration is sufficient to show that the invention was

reduced to practice prior to February 5, 1998, or that in the alternative, if the Declaration is insufficient to establish actual reduction to practice, the facts illustrate due diligence coupled with prior invention.” (Appeal Br. 9).

We are not persuaded by Appellants’ showing of facts in the Declaration to be sufficient in character and weight as to establish actual reduction to practice prior to the effective date of the reference. Rather, we find that the evidence presented in the Exhibits appended to the Declaration, and statements made therein, at best show conception. In fact, the claimed system and method are discussed as to future capability in the appended Exhibits. (FF 2).

Moreover, the Declaration and appended Exhibits fail to assert any facts supporting a claim of due diligence from the alleged time of conception date forward, and thus cannot support conception of the invention prior to the effective date of the *Aeromed* reference coupled with due diligence from prior to this date to a subsequent reduction to practice or to the filing of the application.

Appellants, in an attempt to establish actual reduction to practice prior to the critical date, allege in their Declaration that a Beta test was conducted prior to February 5, 1998. However, other than the mere assertion made in the Declaration that a beta test occurred, the Declaration offers no other corroborating evidence to support this allegation, and hence fails on its face. (FF 4).

In support of their allegation that a Beta test occurred prior to the critical date, Appellants refer to the contents of their Supplemental Declaration (Appeal Br. 10). However, we cannot consider this document in

our review here because the Examiner below did not enter it into the record. (FF 5).

With this understanding, we find that *Aeromed* is available as a reference, and claim 2 requires; *a third module comprising instructions for tracking the actual flight path of the aircraft and determining whether the actual flight path varies from the calculated flight path.*

We find that the “Examiner interprets the Aeromed reference as providing instructions to the user for determining whether the actual flight path varies from the calculated flight path, i.e. ‘Aeromap shows you the flight plans of all active units as lines on the map. Position reports are shown as dots’” (Answer 16).

We disagree with the Examiner. The claim requires that the instructions be for the third module and not for human action, i.e., code for the system to automatically determine whether the actual flight path varies from the calculated flight path. We do not find such instructions disclosed in *Aeromed* sufficient to establish anticipation, and thus will not sustain the anticipation rejection of claim 2. Since claim 9 depends from claim 2, and since we cannot sustain the rejection of claim 2, the rejection of claim 9 likewise cannot be sustained.

35 U.S.C. § 103(a) Rejection

Appellants argue only independent claim 2, advancing no substantive argument for independent claims 10 and 15. Therefore, claim 2 is the representative, and the remaining independent claims 10 and 15 standing or falling with claim 2. 37 C.F.R. § 41.37(c)(1)(vii) (2007).

Claim 2 requires;

a second module comprising instructions for generating a calculated flight path to the patient site;

a third module comprising instructions for tracking the actual flight path of the aircraft and determining whether the actual flight path varies from the calculated flight path.

Appellants argue that “[b]ecause this display [in Nathanson] is a part of the on-board vehicle hardware, the driver would be the only person to view the display, and the driver would already be aware that a different road is being taken to the destination.” (Appeal Br. 18)

We disagree with Appellants because Nathanson explicitly discloses the use of a LORAN positioning system provided in conjunction with a display. (FF 8) As such, the LORAN positioning system would allow the driver to view his/her position on the display/monitor instead of having to look for street signs or landmarks to establish actual position.

Appellants further argue that “[t]here is, thus, no teaching in the cited portion of Nathanson which discloses instructions for determining whether the actual flight path varies from the calculated flight path, nor is there any suggestion or motivation to modify the system to include such instructions.” (Answer 18).

We disagree with Appellants because we find that Nathanson’s disclosure of a “Distance Out of Way” mode meets the claim requirement of *determining whether the actual path varies from the calculated path*. We read the path mapped to the new stop in Nathanson as the *calculated path to the patient site*, and the pre-insertion travel path as *the actual path* which would include the present position of the vehicle from which the distance out of way is determined. (FF 6).

Construing the claim in this manner, we find that Nathanson discloses that the Distance Out of Way is a determination of variance between the present position and the new stop (FF 6, 7). As such, we find that Nathanson meets the claim requirement of *determining whether the actual flight path varies from the calculated flight path*.

We also affirm the rejection of dependent claim 9, since Appellants have not challenged such with any reasonable specificity (see *In re Nielson*, 816 F.2d 1567, 1572 (Fed. Cir. 1987)).

CONCLUSIONS OF LAW

We conclude the Examiner did err in rejecting claims 2 and 9 under 35 U.S.C. § 102(a) as being anticipated by Aeromed.

We conclude the Examiner did not err in rejecting claims 2, 9, 10 and 15 under 35 U.S.C. § 103(a) over Nathanson in view of Schriewer.

DECISION

The decision of the Examiner to reject claim 2, 9 10 and 15 is AFFIRMED.

No time period for taking any subsequent action in connection with this appeal may be extended under 37 C.F.R. § 1.136(a)(1)(iv).

AFFIRMED

MP/NLK